

SOUTH AFRICA / JUDGMENT

Nzwana v Dukes Motors t/a Dampier Nissan (1170/2018) [2019] ZAECHGHC 81 (3 September 2019) [2019] ZAECHGHC 81

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M J Lowe

CASE / FILE NUMBER

1170/2018

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IN THE HIGH COURT OF

SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Date

heard: 15

August 2019

Date

delivered: 03

September 2019

Case No: 1170/2018

In

the matter between:

IVY

PUSELETSO NZWANA

Applicant

and

DUKES

MOTORS t/a DAMPIER NISSAN

Respondent

JUDGMENT

LOWE, J:

INTRODUCTION

- [1] Applicant seeks confirmation of the return of Mercedes Benz C180, 2007 vehicle (“the vehicle”) to Respondent in terms of Section 20(1)(a) of the Consumer Protection Act 68 of 2008 (“the CPA”) with refund to Applicant of the purchase price paid therefore with interest from date of payment. Applicant also refers to Section 56(1) and (2) of the CPA.
- [2] Respondent seeks dismissal of the Application having tendered to allow Plaintiff to take the vehicle back.
- [3] In summary in this matter Applicant purchased a secondhand Mercedes Benz 2007 Model on 6/7 July 2017.
- [4] She paid a deposit of R50,000.00 and financed the balance of the total purchase price of R87,631.48 which with finance charges came to R104,375.00.
- [5] She took delivery of the vehicle on 7 July 2017 noticing scratch marks on the side of the vehicle, a torn mud flap and CD Shuttle not working – she nevertheless went ahead. On the same day whilst driving she noticed that the bumper had “shifted”. She took the vehicle back to Respondent at their request having notified them of the bumper issue. She wanted to return the vehicle against a full refund. She left the vehicle with Respondent who did not and has not returned the purchase price to Applicant.
- [6] On 15 August 2017 Applicant’s Attorney demanded refund of the purchase price referring to Section 20(1)(a) of the CPA.
- [7] Respondent resists this and claims that Applicant was aware of the defects, save for the bumper, and agreed to purchase a secondhand vehicle. It alleges that the bumper was a minor issue simply repaired, not justifying return.
- [8] Applicant’s cause of action purportedly relies on Section 20(1)(a) and 20(2) of the CPA as also Section 55, 56(1) and (2) thereof, and not the Common Law.
- [9] Applicant does not allege compliance with the statutory remedies referred to in Section 69 in any manner at all, nor does there appear to have been such compliance.
- [10] In fact properly viewed what Applicant wants is an order (in terms of the CPA) compelling Respondent to take back and retain the vehicle (of which she took delivery and then returned, having paid the purchase price). Whilst Respondent, having delivered the vehicle and having been paid therefore, admits its physical return by Applicant but tenders return of same, the bumper having been secured, but raises various technical objections.

[11] Respondent argues:

[11.1] That this Application is a nullity as the Notice of Motion was not signed by a local attorney in terms of the Rules – a point taken in the papers and in argument.

[11.2] That the Court has no “jurisdiction” as the alternative remedies referred to in Section 69(d) of the CPA have not been exhausted.

[11.3] That in any event, and on the facts, Applicant, on the merits, is not entitled to return the vehicle, this being sold as a secondhand vehicle after she inspected same and in the presence of immaterial defects such as are to be expected in a secondhand vehicle and that the bumper thereafter became loose, was not such as to entitle return.

[12] I will deal with the first two issues at the outset as either, if correct, are dispositive of the Application.

SIGNATURE OF SUMMONS

[13] As to the issue of non-signature by a local attorney, I accept that the Notice of Motion ought to have been signed by an attorney admitted in the Eastern Cape Province as provided in the Rules. There is however no prejudice whatsoever to Respondent on the facts of this matter and all the necessary papers and affidavits have been filed. I have no doubt that in the circumstances, and having regard to my discretion to condone and Section 173 of the Constitution of the Republic of South Africa, that this irregularity should be condoned. Not to condone this would certainly not serve justice and equity.[1]

SECTION 69 OF THE CPA

[14] The next issue is whether this Court may at this stage entertain this Application – this referred to by Respondent as a jurisdictional issue. The real issue is in fact whether Applicant was required to exhaust the internal remedies created in terms of Section 69(d) of the CPA, not a question of jurisdiction in fact.

[15] Chapter 3 of the CPA deals with the protection and enforcement of rights in the Act. Section 69 provides that persons contemplated in Section 4(1) may seek to enforce any right in terms of the CPA in a number of ways. Sections 4 and 69 set this out as follows:

“4 Realisation of consumer rights

- (1) Any of the following persons may, in the manner provided for in this Act, approach a court, the Tribunal or the Commission alleging that a consumer's rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:
 - (a) A person acting on his or her own behalf;
 - (b) an authorised person acting on behalf of another person who cannot act in his or her own name;

- (c) a person acting as a member of, or in the interest of, a group or class of affected persons;
- (d) a person acting in the public interest, with leave of the Tribunal or court, as the case may be; and
- (e) an association acting in the interest of its members.”

“69 Enforcement of rights by consumer

A person contemplated in section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by-

- (a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;
- (b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
- (c) if the matter does not concern a supplier contemplated in paragraph (b)-
 - (i) referring the matter to the applicable industry ombud, accredited in terms of section 82 (6), if the supplier is subject to any such ombud; or
 - (ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;
 - (iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; or
 - (iv) filing a complaint with the Commission in accordance with section 71; or
- (d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.”

[16] As to matters brought inter alia before a Court, Sections 4(2), (3) and (4) of the CPA provide as follows:

“(2) In any matter brought before the Tribunal or a court in terms of this Act-

- (a) the court must develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally, and in

particular by persons contemplated in section 3 (1) (b); and

- (b) the Tribunal or court, as the case may be, must-

- (i) promote the spirit and purposes of this Act; and

(ii) make appropriate orders to give practical effect to the consumer's right of access to redress, including, but not limited to-

- (aa) any order provided for in this Act; and
- (bb) any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of this Act.
- (3) If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3 (1) (b).
- (4) To the extent consistent with advancing the purposes and policies of this Act, the Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier, or required by this Act to be produced by a supplier, to the benefit of the consumer-
 - (a) so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer; and
 - (b) so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect, having regard to-
 - (i) the content of the document;
 - (ii) the manner and form in which the document was prepared and presented; and
 - (iii) the circumstances of the transaction or agreement.”

[17] The purpose and structure of Section 69 is summarized, in my view correctly, in Commentary on the Consumer Protection Act >[2] (“The Commentary”) as follows:

“1. Purpose and structure. Section 69 sets out the route of redress where enforcement of consumer rights in terms of the CPA is sought and is significantly entitled ‘Enforcement of rights by consumer’. Its focus therefore is the avenues of redress available to a consumer as

opposed to a supplier as the CPA in accordance with s 3(1)(b) attempts to ensure that consumers, who are often financially impeded from pursuing disputes with suppliers, are afforded sufficient access to redress. As such s 69 lists the various avenues of redress that the CPA provides to a person mentioned in s 4(1) for purposes of enforcing any right in terms of the CPA or in terms of an agreement or transaction or otherwise with regard to resolving a dispute with a supplier. The various entities that can be approached for purposes of redress are not indicated in s 69 in an order that presents a clear picture of the exact route that a person has to follow in this quest for redress. The route of redress envisaged by s 69 thus has to be interpreted with the aid of various other sections in the CPA as discussed below. As indicated above, the main body tasked with enforcement of the CPA is the National Consumer Commission may inter alia refer certain matters to the National Consumer Tribunal, which is an ad hoc body that was established in terms of s 26 of the National Credit Act. The Tribunal may also in certain instances give leave to a

consumer to approach it directly. Various other entities may also be approached for redress, namely ombuds with jurisdiction, industry ombuds, consumer courts, alternative dispute resolution agents and, apparently as an instance of last resort, civil courts. Section 69 has to be read with s 10, which provides for jurisdiction of the equality courts involving matter of discrimination as contemplated in Part A of Chapter 2 of the CPA. For a comprehensive overview of the redress envisaged by s 69 it further has to be read in context with ss 70 to 78 and ss 83 to 119 of the CPA.”

[18] As to the implied hierarchy of bodies to be approached the commentary suggests again, in my view correctly, as follows:

“3. Implied hierarchy. As noted above, s 69 does not set out a specific hierarchy or order according to which the bodies or entities mentioned in the section

may be approached, save for expressly providing that a (civil) court with jurisdiction over the matter may be approached ‘if all other remedies available to that person in terms of national legislation have been exhausted’. It is, however,

submitted that s 69, read in context with various other sections of the Act which impact on it, contains an implied hierarchy. The preferred route to redress in terms of this implied hierarchy is that an alternative dispute resolution body should first be approached in an attempt to resolve a dispute before a complaint is filed with the Commission, which can then either deal with the complaint or refer it to another body in accordance with the provisions of the CPA, or issue a non-referral.”

[19] As to interpretation of the CPA, Section 2 thereof contains a number of provisions which must be applied. The provisions must be interpreted purposively and particularly with regard to Section 3 thereof. That is in a manner which “attributes meaning to a legislative provision in the light of the purpose which it seeks to achieve in the context of the instrument of which it forms part”. [3]

[20] Since 2000 a number of Consumer Protection laws have been placed on the Statute Book providing for wide ranging Consumer Protections. [4] The CPA applies to most Consumer Agreements not governed by the NCA or Financial Service Board Legislation. In reality it must be accepted that the common law also remains applicable to consumer contracts to some extent, forming the basis thereof, unless excluded or qualified by the Legislation.

[21] The purpose of the CPA is set out in the Preamble and makes it clear that the inequity of the past (apartheid and discriminating laws) have created high levels of poverty and social and economic inequality which makes it necessary to fulfill the rights of historically disadvantaged people and generally protect their interests subjected to abuse or exploitation in the economic market inter alia: [5]

“6. Purpose and policy – Section 3. The general purpose of the CPA, as set out in the Preamble, is augmented by more specific aims and objectives in s 3. Section 3(1) states that the purpose of the Act is to promote and advance the social and economic welfare of consumers in South Africa by establishing a

legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally, and by reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers who are low-income persons or persons comprising of low-income communities, or who live in remote, isolated or low-density population areas or communities, or who are minors, seniors or other similarly vulnerable consumers, or whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented. The CPA is further aimed at promoting fair business practices and protecting consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices and deceptive, misleading, unfair or fraudulent conduct. It is a further aim of the CPA to improve consumer awareness and information and encourage responsible and informed consumer choice and behaviour. Finally the CPA aims to provide for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.”

- [22] The Commentary points out[6] that consumer rights involve human rights on at least a horizontal level. Not only does the CPA formulation echo the Constitution in some respects but the CPA protects consumers’ dignity, a fundamental Constitutional right.[7] This clearly implicates Constitutional issues which are raised in this matter being Access to Justice, Section 34 of the Constitution and the proper interpretation of Section 69 of the CPA and its application.
- [23] In terms of Section 34 of the Constitution every person has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court, or where appropriate another impartial tribunal or forum.
- [24] This fundamentally allows, as a substantive right, every person access to Courts, individual equality and non-discrimination. This is laid down as a fundamental right. Inequality clearly goes against the principle of equality.[8]
- [25] Section 34 is closely related to Section 1(c) of the Constitution which recognises the rule of law. It forms part of a three piece composite of rights being Sections 34, 33 and 32 and is referred to as a leverage right allowing litigants to leverage their other substantive rights. These are thus predominately procedural guarantees rather than rights to specific entitlements.[9] However as suggested “an element of meaningful access (to the Courts) is the end remedy”.
- [26] The structure of the right in Section 34 contains three central components:
- i) The right for disputes to be decided before a Court;
 - ii) The right to a fair public hearing;
 - iii) That where appropriate the Court may be replaced by an independent impartial tribunal or forum. [10]

- [27] In my view, however, the provision of structural alternative dispute avenues in the CPA with final recourse to the Court meets the Section 34 imperative. There seems to me to be no damage done to the principle of the balancing of fairness in the structural approach set out in Section 69 of the CPA, interpreted against the background of Section 9 and 34 of the Constitution.
- [28] Where the language of the Statue is clear and unambiguous in context this should normally be applied.[11] In effect Section 3(1) of the CPA provides that any ambiguity that there is in interpretation of the Act must be interpreted in the consumer's favour.[12] Further, in my view, this must also take into account relevant Constitutional rights and imperatives.
- [29] By virtue of Section 69(d) of the CPA there is a limitation upon access to Civil Courts in matters arising under the CPA in respect of Consumer Rights (unless Common Law Rights) and thus a Court with jurisdiction (not a Consumer Court) may be approached by a person with locus standi "if all other remedies available to that person in terms of National Legislation have been exhausted".[13]
- [30] In *Chirwa v Transnet Ltd and Others* [14] the Constitutional Court held that where specialized frameworks had been created for dispute resolution parties must pursue their claims primarily through such mechanisms, this in the context of labour legislation and the Labour Relations Act 66 of 1995 ("the LRA"). Of course one must bear in mind that the Court emphasized that it would be loath to deprive a litigant of existing rights, but held that:[15]

"[41] It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving

employment-related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims."

- [31] With this as background, the Section 69 hierarchy applicable is set out in The Commentary [16] as follows:

"33. Summary of routes to redress. It is submitted that in the absence of express directions by s 69, the section appears to imply that generally the preferred route for redress is the following: If a dispute as contemplated in the CPA arises between a consumer and a supplier and they cannot resolve such dispute between themselves, the parties should first attempt to resolve their dispute by means of alternative dispute resolution by approaching one (not all) of the alternative dispute resolution agents mentioned in the CPA if they have not previously and unsuccessfully attempted this route. If there is an ombud with jurisdiction or industry ombud in the particular sector, the ombud may be approached. Alternatively the consumer may approach a consumer court with jurisdiction as contemplated by the CPA, if such court exists and is operational. If these entities are unable to resolve the dispute, a complaint may be lodged with the National Consumer Commission. Consumers should however be

mindful of the fact that the Commission does not investigate individual complaints anymore but only investigates endemic harmful business practices and trends and focuses on issues of policy, hence the Commission may decline to investigate a particular matter and refer the consumer to another entity for assistance. However, where the Commission does decide to accept the lodging of a complaint it will then either issue a non-referral notice or refer the complaint to another regulatory authority or will investigate the matter. After an investigation into a complaint, the Commission may refer the matter to the National Prosecuting Authority (in respect of an offence) or the equality court (in respect of discriminatory conduct), or where

it concludes that prohibited conduct has occurred, it may propose a draft consent order if agreement is reached with the respondent

regarding an appropriate order. Alternatively, the Commission may issue a compliance notice or refer the matter to a consumer court (if there is one in the province and the Commission believes that the issues raised by the complaint can be dealt with expeditiously and fully by such referral), or it may refer the matter to the Tribunal. Where the Commission issues a non-referral notice in response to a complaint, other than on the grounds contemplated in s 116, the complainant may refer the matter directly to the consumer court or the Tribunal, with leave of the Tribunal. It may happen that a consumer who resides in a remote area of the country, where there is no consumer court or alternative dispute resolution agent, is involved in a dispute with a supplier and no ombud with jurisdiction or no industry ombud exists that can deal with that matter. In such instance it is submitted that such consumer may then, as a first step in accessing redress, lodge a complaint with the Commission, which will then either deal with the matter or divert it in accordance with s 72. With regard to referral of matters to the Tribunal it is further submitted that the fact that the Tribunal is mentioned first in s 69 does not justify the inference that the Tribunal may generally be approached as a 'point of first entry' in matters involving infringements of consumer rights. Apart from the fact that the Tribunal has limited capacity given the fact that it is an ad hoc body, the circumstances under which the Tribunal may be approached are clearly set out in ss 73, 74, 75, 114 and 116. It is clear from these provisions as discussed below that the Tribunal cannot be approached as point of first entry for purposes of redress in terms of the CPA as, even in the case of a direct referral by a consumer, the National Consumer Commission should have been approached first and should have non-referred the specific complaint."

[32] The Commentary points out however:[17]

"34. Recent court cases dealing with the routes of redress however display diverging opinions on the preferred routes of redress and whether s 69 contains an implied hierarchy in this regard: in Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others[18] the court took a more flexible approach and stated that in its view s 69 must be read contextually, in conjunction with s 70 of the CPA and the purpose of the statutory enactment. In this regard it emphasised the words 'who may be' in s 70(1). The court thereupon stated:

Section 70 puts paid to any doubt on whether the CPA seeks to introduce the hierarchical system of dispute resolution in section 69. It makes it plain that a consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution who may be any of the institutions listed in the section.

The court indicated that on a plain reading of s 69(b), a consumer may seek to enforce any right in terms of the CPA or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by (a) referring the matter directly to the Tribunal, if such a direct referral is permitted by the Act in the case of a particular dispute or (b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud. If the supplier is not subject to the jurisdiction of any such ombud, the consumer has various alternative dispute resolution mechanisms set out in s 69(c). The court pointed out that this was because the word 'or' in s 69(c), which postulates that interpretation. In the court's view it could never have been the intention that consumers subject to the ombud with jurisdiction are denied access to various other dispute resolution mechanisms accorded to other consumers. It remarked that such a construction would not be in conformity with the purpose of the CPA to provide for an accessible, harmonised, effective and efficient system of redress. Hence the court stated that it was of the view that, had the legislature intended that a particular category of consumers submit to the jurisdiction of a specific dispute resolution forum only, it would have expressly said so."

[33] I agree with The Commentary[19] that this does not oust the Court's jurisdiction but that it implies that a Court cannot be approached until all other statutory

remedies (including Section 69) have first been exhausted that do not entail Court intervention. This would seem to mean that in any action or Application brought before a Court would require to allege and plead due compliance herewith.[20]

[34] In my view the narrow approach adopted in Joroy, that Section 69(d) cannot be construed to have more than one meaning as the wording in context is clear and unambiguous,[21] is correct, the CPA being interpreted in its context and in the manner set out above. The use of the word "if" in Section 69(d) is, properly interpreted, indicative of the intention to make prior recourse to the dispute resolution mechanisms created, an essential imperative.

[35] In Joroy the Court held:

"[8] I am not of the view that s 69(d) can reasonably be construed to have more than one meaning at all. I am in agreement with Mr Tsangarakis that the wording of the said section is clear and unambiguous. It is specifically stated that the consumer may approach the court if all the aforementioned avenues of redress have been exhausted. The legislature was very specific in prescribing the redress that a customer has in terms of this section. I fail to see how any other interpretation can be given to the word 'if'. Consequently I do not venture into the rules of interpretation or the provisions of the CPA in this regard.

- [9] The dispute resolution mechanisms available to an aggrieved consumer in terms of s 69(a), (b) and (c) of the CPA include referring the matter directly to the Tribunal; to the applicable ombud with jurisdiction; to the applicable industry ombud, accredited in terms of s 82(6); to the consumer court; alternative dispute resolution; and filing a complaint with the Commission. In the case of the motor industry an ombud in terms of s 82(6) has been accredited. The Motor Industry Ombudsman of South Africa (MIOSA) deals specifically with dispute resolutions between consumers and the motor industry.
- [10] It was held by the Constitutional Court that, where a specialised framework has been created for the resolution of disputes, parties must pursue their claims primarily through such mechanisms. (See *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC) ((2008) 29 ILJ 73; 2008 (3) BCLR 251; [2008] 2 BLLR 97; [2007] ZACC 23.)”
- [36] Although short in length, I agree herewith on a proper interpretation of Section 69(d) in context, on a somewhat expanded exposition.

THE RESULT

- [37] In the result and having regard to the above it would seem then that the requirement of prior compliance with statutory remedies, particularly Section 69, effectively presently temporarily bars Applicant’s access to this Court on the facts of this matter.
- [38] I expressly do not make a finding on the merits of the dispute in this Application as Applicant remains free to utilize any of the dispute resolution mechanisms available in terms of the CPA, and it would thus be inappropriate to comment on such merits.

COSTS

- [39] As to costs Applicant’s counsel argued that each party should pay their own costs (effectively a Biowatch argument [22]) whereas Respondent sought that it be awarded costs.
- [40] In *Biowatch* it was pointed out that generally in Constitutional litigation against the State the successful litigant should not be ordered to pay the costs. This is a judicial discretion having regard to all relevant considerations, and only if not frivolous, vexatious or manifestly inappropriate.
- [41] In matters raising Constitutional issues against Universities[23] the Constitutional Court found the *Biowatch* principle applicable.
- [42] In this matter a genuine Constitutional issue arose for consideration as discussed earlier. Further the Section 69 issue raised by Respondent is one not as yet decided in this Division, with little authority in others, and none I am aware of in Courts higher than this.
- [43] The usual Rule that a successful party should be awarded costs is always subject to judicial exercise of the Court’s discretion.

Where Constitutional issues are raised bona fide this must necessarily be taken into account in respect of an appropriate just and equitable costs order. The judicial discretion has been described as “very wide” or “overriding”.[24] Judicially in this context means “not arbitrarily” one must consider the circumstances, weigh the various issues that have a bearing on costs and make an order that is fair and just between the parties.[25]

[44] The point of “jurisdiction” in this matter was raised in the answering papers referring particularly to Section 69(d). Both parties then pursued their

respective cases accordingly and before me the central issue became the issue of the interpretation of Section 69.

[45] In my view, the principles relating to costs impact upon access to justice – this includes the chilling effect adverse costs

orders have on Constitutional litigation.[26] It is also important to consider the position of the litigants. Applicant in this matter is a female retired educator and no doubt a costs order against her would have the most serious financial consequences for her. The issue of Section 69 and prior remedies was res nova in this Court and a matter of considerable public importance not without difficulty.

[46] It seems to me that in all the circumstances and having regard to the above considerations, in my general costs discretion, and further on the basis of justice and equity justify my ordering each party to pay her and its own costs.

[47] I briefly comment on the reserved costs issue, in respect of the hearing set down for 28 February 2019. There is a dispute as to why the matter did not proceed. The papers disclose that Respondent’s Heads of Argument were filed (in absence of Applicant’s Heads of Argument) on 13 February 2019 together with a Notice in Terms of Rules of Practice (ECD) 15A, as required. Applicant’s Heads of Argument were filed well out of time at 15h55 on 6 February 2019 only one full

day before the set down date. An Application for Condonation in respect of “Founding Affidavit: Application for Condonation” with no supporting Affidavit. Applicant failed to file its required Rule 15(A) Practice Note. The Heads were in fact due for Applicant and Respondent 15 and 10 Court days respectively prior to the hearing.

[48] As to the costs reserved on two occasions (including 28 February 2019) the matter being postponed, these too must follow the approach I have adopted above, there being no good reason set out in the affidavits filed in this regard to deviate from each party to pay their own costs approach I have adopted and for the same reasons. Indeed, in my view, I need in no way attempt to resolve the limited disputes raised in the affidavits in this regard, and it would not be desirable to do so, even if I were able to do so which is by no means a foregone conclusion.

ORDER

[49] In the result:

- (a) The Application is refused, Applicant having failed to allege compliance with the alternative dispute resolution options applicable to this matter as referred to in Section 69 of the CPA.
- (b) Applicant and Respondent are to pay their own costs including those reserved.

M.J. LOWE

JUDGE OF THE HIGH COURT

Appearances:

Obo Applicant: Adv Z L Mapoma

Instructed by: Julia Mfundisi Attorneys, Grahamstown

Obo Respondent: Adv S A Sephton

Instructed by: Huxtable Attorneys, Grahamstown

[1] Liberty Group Ltd v Singh and Another 2012

(5) SA 526 KZD

[2] Naudé and Eiselen – Juta – at 69-1

[3] Du Plessis Re-Interpretation of Statutes (2002) 96. Generally as to interpretation see: Natal Joint Municipality Pension Fund v Endumeni Municipality 2012

(4) SA 593 at 603F-604B, para 18 and 604C-D.

[4] Electronic Communications and Transactions Act 250 of 2002, National Credit Act 68 of 2008 (NCA) and the CPA.

[5] Commentary on the Consumer Protections Act, page 4 and 5, para 6

[6] Page 17 para 27

[7] Commentary page 17 para 29; Constitution Section 10

[8] LAWSA 5(4); 199.

[9] Constitutional Law of SA, 2nd Ed, Vol 4, Woolman 59-3.

[10] See Nedbank v Gqirana NO & Another and 6 similar cases (Special Full Bench, Case no.: 1203/2018, ECD Grahamstown, delivered on 20 July 2019)

[11] Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others [2000] ZASCA 20; 2000

(2) SA 797 SCA 810D Du Plessis Re-Interpretation of Statutes (2002) 118

- [11] Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others [2000] ZASCA 20; 2000 (2) SA 797 SCA 810D
- Du Plessis Re-Interpretation of Statutes (2002) 118
- [12] The Commentary 2-4
- [13] The Commentary 69-16
- [14] 2008
- (4) SA 367 (CC)
- [15] Chirwa at 380, para [41]
- [16] 69-20 para 33
- [17] 69-24 para 34
- [18] [2016] ZANCHC 1 (unreported case no 1260/2015 (NCK) (1 April 2016))
- [19] 69-16
- [20] See Kerr's Law of Sale and Lease, 4th Edition, Graham Glover (LexisNexis) at 10.2.7.3.6 pages 277 to 279, Joroy 4440 CC v Potgieter and Another NNO 2016
- (3) SA 465; Ngoza v Roque Quality Cars [2019] ZANCT 104 (28 September 2017) – Para 30-33 and [2018] ZANCT 70 (June 2018); Oos Vrystaat Kaap Bedryf v Cilliers 2019 JDR 0049 (EB) Cf : Imperial Group (Pty) Ltd v MEC Economic Development [2016] ZAFSHC 105; Sekgala v Steves Auto Clinic and Another 2017 JDR 0180 GP; Govender v Advanced Pools CC 2018 ZANCT 63 (August 2018)
- [20] See Kerr's Law of Sale and Lease, 4th Edition, Graham Glover (LexisNexis) at 10.2.7.3.6 pages 277 to 279, Joroy 4440 CC v Potgieter and Another NNO 2016
- (3) SA 465; Ngoza v Roque Quality Cars [2019] ZANCT 104 (28 September 2017) – Para 30-33 and [2018] ZANCT 70 (June 2018); Oos Vrystaat Kaap Bedryf v Cilliers 2019 JDR 0049 (EB)
- Cf : Imperial Group (Pty) Ltd v MEC Economic Development [2016] ZAFSHC 105; Sekgala v Steves Auto Clinic and Another 2017 JDR 0180 GP; Govender v Advanced Pools CC 2018 ZANCT 63 (August 2018)
- [21] See also Oos Vrystaat Kaap Bedryf (supra) where the Court confirmed the Joroy approach.
- [22] Biowatch Trust v Registrar, Genetic Resources, and Others 2009
- (6) SA 232
- [23] Harrielall v University of KwaZulu-Natal (CCT100/17)

- [2017] ZACC 38; 2018 (1) BCLR (CC) (31 October 2017); Rhodes University v Student Representative Council of Rhodes University and Others (1937/2016) [2016] ZAECGHC 141; [2017] 1 All SA 617 (ECG) (1 December 2016). In the Constitutional Court Ferguson v Rhodes University 2017 JDR 1768 (CC) [23]-[28].
- [24] K & S Dry Cleaning Equipment (Pty) Ltd and Another v South African Eagle Insurance Co Ltd and Another 2001
- (3) SA 652 (W) at 668; Griffiths v Mutual & Federal Insurance Co Ltd
- [1993] ZASCA 121; 1994
- (1) SA 535 (A); Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others
- [1996] ZACC 27; 1996
- (2) SA 621 (CC) para [3].
- [25] Cilliers on Costs 2.01 to 2.04
- [26] Minority Judgment of Poswa J in Biowatch [45] – [46].

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